18.

No. 148.

Brf. of Williams for D.E.

Office Supreme Court U.S.
FILED
JAN 17 1902
Clerk.

Filed Jan. 17, 1902.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1901.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
JOHN S. ELLIOTT,
Defendant in Error.

No. 148.

In Error to the Kansas City Court of Appeals, in the State of Missouri.

STATEMENT, BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

WM. M. WILLIAMS,
For Defendant in Error.

MISSOURI DEMOCRAT PRINT.

IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1901.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
JOHN S. ELLIOTT,
Defendant in Error.

No. 148.

In Error to the Kansas City Court of Appeals, in the State of Missouri.

STATEMENT OF DEFENDANT IN ERROR.

This suit originated in the Circuit Court of Cooper County, in the State of Missouri. It is an action by Elliott against the Railway company, upon

a bond given by it, to obtain a temporary injunction in a certain proceeding in the Circuit Court of the United States for the Western District of Missouri.

Elliott brought a suit at law against the Railway company to recover a large amount of money alleged to be due him for railway ties furnished to and accepted by said company under a written contract between them. While this suit was pending in the United States Circuit Court for the Western District of Missouri, the Railway company filed a bill upon the Equity side of the court, seeking to enjoin Elliott from the further prosecution of said action at law, and asking certain other equitable relief.

The court, as a condition precedent to granting the temporary injunction, required the Railway company to enter into a bond to Elliott in the sum of twenty thousand dollars. This was done and the bond duly executed in the following form:

"INJUNCTION BOND.

"Know all men by these presents; that the undersigned, the Missouri, Kansas and Texas Railway company, a corporation, as principal, and E. C. Simmons, of St. Louis, Mo., and Wm. Nichols, Mo., as sureties are held and firmly bound unto John S. Elliott in the sum of twenty thousand dollars, to the payment whereof we bind ourselves, our successors, heirs and administrators, firmly by these presents.

Signed and sealed this 29th day of November, 1893."

The condition of the above bond is as follows, to-wit:

Whereas, the above-bounden principal, the Missouri, Kansas and Texas Railway Company, in a suit in equity instituted by it against the said John S. Elliott, in the Circuit Court of the United States

for the central division of the western district of Missouri, and which is numbered 2092 in said court, has applied for and obtained a temporary injunction, the nature and purpose of which said temporary injunction is to restrain the prosecution of an action at law, in which the said John S. Elliott is plaintiff and the said Missouri, Kansas-Railway company is defendant, now pending in the above named court and under the number 2082.

Now, if the said Missouri, Kansas and Texas Railway Company, will abide the decision which may be made in said case, number 2092, and upon said injunction and shall pay all sums of money, damages and costs that shall be adjudged against it if the said temporary injunction shall be dissolved, then this obligation will be void, otherwise to remain in full force and effect.

The Missouri, Kansas and Texas Railway Company,

By THOS. C. PURDY, [SEAL.]
Vice-President and General Manager.
W. NICHOLS, [SEAL.]
E. C. SIMMONS, [SEAL.]

The issues in the equity suit were referred to a master, and, upon the coming in of his report, exceptions thereto filed by the Railway company were sustained, and the injunction made perpetual. Elliott appealed.

The decree of the Circuit Court was reversed by the U. S. Circuit Court of Appeals of the Eighth Circuit, and the case remanded. The Circuit Court of the United States, on the 19th day of October, 1896, in accordance with the mandate of the U. S. Circuit Court of Appeals "ordered and adjudged that the injunction heretofore granted in this

cause be and the same is hereby dissolved," and further that the bill be dismissed, with costs.

Elliott, thereafter, brought this suit upon the injunction bond, at the October term, 1897, of the Circuit Court of Cooper County, in the State of Missouri, to recover the damages sustained by him in consequence of the temporary injunction.

The petition, as it is called in the Missouri practice, alleges the execution of the bond, and for breach thereof assigns that "said temporary injunction was dissolved, and that plaintiff in and about the procuring of the dissolution of said injunction was put to great trouble and expense, and necessarily laid out and expended large sums of money, and incurred liabilities; that he was compelled to spend a great deal of time in procuring and presenting evidence to secure the dissolution of said injunction, and employed attorneys to represent him in said matter, and incurred other liabilites on account thereof; that his personal expenses in traveling from place to place where the evidence was taken in reference to said injunction, in support of the application therefor, and in going to and returning from the place of trial, were about two hundred dollars, and that the reasonable value of the services of plaintiff's attorneys in said matter, incurred by plaintiff, was eighteen hundred dollars, and that plaintiff has sustained damages in the sum of two thousand dollars, and that said defendant has failed to pay the same, or any part thereof." Plaintiff asked judgment for the penalty of the bond, and that execution issue for two thousand dollars, the damages claimed, and costs.

The answer admits the incorporation of the Railway company, and that a temporary injunction was granted at its instance by the Court Circuit of the United States to prevent the prosecution by Elliott of

the action at law pending against it, and also admits the execution of the bond, and alleges that the granting of the injunction was merely an incident to the suit instituted for the main and principal purpose of cancelling and annulling a certain report of the inspection of ties; and that all these proceedings were necessary to enable the defendant to make its defense in the United States Circuit Court to the action at law instituted by plaintiff against it. All the other allegations of the petition are denied by the answer.

The case came on for trial before the court without a jury. Elliott introduced evidence tending to show that he had sustained damages to the amount of two thousand dollars, including the attorneys' fees incurred by him in securing a dissolution of the temporary injunction.

The Railway company did not by its answer; by any objection to the introduction of evidence; or by the declarations of law asked by it, invoke any defense against the allowance of counsel fees, based upon the rules of practice or decision in the Federal Courts. No Federal question was attempted to be raised by the pleadings; by the objections to the testimony; or by the declarations of law in the trial court.

The cross examination of Mr. Cosgrove, the witness in behalf of Elliott in regard to counsel fees, was directed entirely to an effort to show that he had included in his estimate of such fees services rendered, not merely to secure a dissolution of the injunction but for the trial of the case.

The court was asked to declare the law to be that under the pleadings and evidence plaintiff was not entitled to recover; and further that he was not entitled to recover as damages on the injunction bond any sum he may have paid out or become liable for as attorneys' fees. The attention of the trial court was not specially directed by the pleadings, or by any ob-

jections to the introduction of evidence, or by the declarations of law asked by the Railway company, to the claim now attempted to be set up—that no attorneys' fees could be allowed in a suit upon the bond in the State Court, because such an allowance would not be made in the Federal Court where the bond was given.

The record does not show that the attention of the trial court was called to any title, right, privilege or immunity claimed under the constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States. So far as the record goes, every claim or defense made by the Railway company in the trial court may have been based upon the rules of practice and decision in the local courts. There is nothing to show that any right, immunity or privilege under the laws of the United States, or the practice in the courts thereof, was set up. There is certainly no *express* reference to any such claim in anything done or said in the trial court, as contained in the record.

Judgement was rendered by the Circuit Court of Cooper County for the penalty of the bond, and the damages assessed at two thousand dollars, and execution awarded for that amount.

The Constitution of the state of Missouri, in fixing the jurisdiction of the Supreme Court and of the Courts of Appeals, provides among other things that the Supreme Court shall have cognizance of all appeals "in cases involving the construction of the Constitution of the United States, or of this State; in cases where the validity of a treaty, or statute, or authority exercised under the United States is drawn in question."

The Railway company, notwithstandings its present claim, applied for and was granted an appeal to the Kansas City Court of Appeals. The case was

submitted to that court, and a decision rendered affirming the judgment of the trial court. The Railway company then made an objection to the jurisdiction of the court of appeals, on the ground, among others, that a Federal question was involved in the record, and made an application for a re-hearing and to transfer the case to the Supreme Court. This was overruled.

The Railway company then applied to the Supreme Court of the State of Missouri for a writ of prohibition, directed to the Kansas City Court of Appeals, on the ground that the case was not within the jurisdiction of the latter. This writ was denied. The court, in the opinion rendered upon this application, said:

"To us the contention of relator does not seem tenable. We fail to discover from the record anywhere how, 'the validity of a treaty, or statute of, or authority exercised under the United States is drawn in question,' or that a Federal question may be said to be involved in the case. In fact, both the petition and the answer in the case before the trial court recognized the validity of the bond, and the action of the Federal Court in all its orders regarding or affecting the same."

"That a Federal question could have been raised is not denied; but that such a question was not raised is most manifest. If no challenge of authority exercised under the United States is in fact made by the record, the mere assertion of its existance by counsel, coupled with the further fact that such a question might have been made under a proper answer, or by the development of a proper state of facts during the progress of the trial, will not suffice to deprive the Kansas City Court of Appeals of its jurisdiction to hear and determine upon the case as it reached that

court, or to invest this court with jurisdiction thereof."

The opinion of the Supreme Court of the State of Missouri upon the application for a writ of prohibition is published in 154 Mo., page 300.

The Railway company then applied for and obtained a writ of error from this court, directed to the Kansas City Court of Appeals.

ARGUMENT OF DEFENDANT IN ERROR.

I

The Railway company, in the trial court, did not specially *set up or claim* any exemption from liability for attorneys' fees, on account of any right, privilege or immunity under the Constitution or laws of the United States, or any such exemption by reason of any authority exercised under the United States. The question now sought to be raised was not presented to the Missouri courts in the manner required by the practice and procedure therein. The answer does not claim any such immunity, and does not rely upon any right, privilege or immunity under the laws of the United States. No objection was made upon *that ground* to the introduction of evidence concerning counsel fees. The declarations of law asked do not refer to any such right, privilege, immunity or exemption. The trial court may well have understood the declarations of law asked to be based upon the practice in the local courts in Missouri. In fact the Railway company insisted that upon the evidence submitted to the trial court, it was not liable for counsel fees under the rules prevailing in the Missouri courts.

Missouri, Kansas & Texas Railway Co. vs. Smith 154 Mo. loc. cit. 312, et seq.

White Live Stock Commission Company vs. Chicago, Millwaukee & St. Paul Railway Co., 157 Mo. 518.

Parlin & Orendorf Co. vs. Hord, 145 Mo. 117.

The Federal question relied upon, to justify a review here of the judgment of the State court, must have been presented to and *passed upon* by the highest court of the state in which a decision in the suit could be had.

The proper method of raising such question must be determined by the rules of practice in the State Courts.

The Constitution of Missouri confers upon the Supreme Court of that State exclusive jurisdiction of all appeals in cases involving the construction of the Constitution of the United States and of that State, and of all cases involving a Federal question. The Kansas City Court of Appeals has no jurisdiction to pass upon or determine any such question, and cannot do so. When a case presenting an issue of that kind is taken to the Court of Appeals, it must be transferred to the Supreme Court for adjudication. It is absolutely beyond the jurisdiction of the Kansas City Court of Appeals to entertain or determine a case involving a Federal question.

The appellate courts must decide the cases presented to them upon the same theory upon which they are tried in the courts of original jurisdiction. Hence it is, that a party relying upon a right under the Federal or State constitution, or desiring to present a Federal question, which, on appeal, the Supreme Court alone can pass upon, must directly present such question to the Trial Court; and the

record must show that this was done, otherwise, it cannot be considered when the case reaches the higher court on appeal. Unless the record expressly shows that the question has been submitted to and passed upon by the lower court, *it must be ignored upon appeal.* The case must be decided by the Court of Appeals, as though such point had never been made or suggested. Such question is not in the case and cannot be injected into it for the first time when it reaches the Court of Appeals.

Plaintiff in error says, on page 18 of its brief:

"Under the decisions and 'Code of Civil Procedure,' of the State of Missouri (Laws of Missouri, 1889, pp. 296-304,) the briefs filed in the Kansas City Court of Appeals became a part of the Record in the case, and may properly be resorted to to ascertain what questions were presented for determination. The briefs of counsel on both sides filed in that court clearly show that the Federal question previously mentioned was distinctly presented, and the immunity claimed by the appellant and resisted by the respondent."

The Supreme Court of Missouri, however, has declared:

"A constitutional question cannot be injected into a case by the briefs and argument of counsel."

"For jurisdiction we must look to the record, and not to the briefs of counsel, and unless the record shows that a question involving the construction of the constitution was fairly and directly raised and passed upon in the Trial Court, this court has no jurisdiction on that ground."

Town of Kirkwood vs. Johnson 148. Mo., 632.

"It has frequently been decided that to give this court Appellate Jurisdiction on the ground that the

case involves the construction of the constitution of the state, the record must show that the point was raised in the trial court and the protection of the constitution claimed by the losing party was denied him. [Parlin and Orendorff Co. vs. Hord 145 Mo. l. c. 119. Hulett vs. Railroad 145 Mo. 35. James vs. Ins. Co. 148 Mo., l. c. 18] And this same is true as to Federal questions."

Shewalter vs. Mo. Pac. Ry Co. 152 Mo. loc. cit. 557.

"If we regard the recitals of the bill of exceptions and those of the record proper as of equal dignity (Douglass vs. Orr, 58 Mo. 573), still no constitutional question can be said to have been properly raised in this case, for only from the briefs of counsel filed in this court are we informed that the question of the constitutionality of the act of 1891 was the basis of the judgment of the Circuit Court, and as we have uniformly held, this does not raise such a question at the proper time and in the proper manner."

Parlin & Orendorff Co. v. Hord, 145 Mo. loc. cit. 119.

The latest utterance of the Supreme Court of Missouri upon the subject is contained in the opinion of Marshall J. in Clark vs. Porter 162 Mo. loc. cit. 523.

"In order to give this court appellate jurisdiction on the ground that the case involves the construction of the Constitution of the United States, it must affirmatively appear from the record that the protection of the Federal Constitution was invoked in the trial court and denied by that court to the losing party before that forum. [Vaughn vs. Railroad 145 loc. cit. 61. Shewalter vs. Railroad 152 Mo. l. c. 551] The record in this case nowhere

shows a compliance with this rule. The Federal constitution was not relied upon, invoked or referred to in the pleading or instructions or in any proceedings in the Circuit Court by the parties, the attorneys, or the Court, nor was any protection afforded by that instrument denied to either party by that court. Cases must be tried in the Appellate Courts on the issues raised and decided in the trial courts." "No Federal right is involved in the decision of this question—Hence this court has no jurisdiction of the cause—For these reasons this case is remanded to the St. Louis Court of Appeals."

It was not sent to the Court of Appeals for that court to decide the Federal question attempted to be injected into the case upon appeal, because the Court of Appeals has no jurisdiction to determine any such question, but to decide the case upon the other issues, as though such Federal question had not been mentioned. Can this court review the judgment of a State Court disposing of a case without reference to any Federal question, and where such State Court has no jurisdiction to hear or decide such Federal question, if properly raised on the record?

There is nothing in the record to show that the Railway company claimed in the trial court immunity from counsel fees on account of the practice of the Federal Courts with reference to such fees in assessment of damages on injunction bonds.

The declarations of law do not set up any such claim. The court was asked to declare the law to be that under the pleadings and evidence the plaintiff was not entitled to recover, and the finding must be for defendant. How could the trial court say that this declaration of law was intended to raise any Federal question? The Railway company admits that

one of its defenses was that plaintiff was not entitled to recover at all, because the damages were not assessed at the time of the dissolution of the injunction. The trial court may well have understood that this decision of law was intended to present for its decision that proposition.

The court was also asked to declare that plaintiff was not entitled to recover as damages on the injunction bond any sum which he may have advanced or become liable for as attorneys' fees. The Railway company contended that the attorneys' fees could not be recovered under the practice in the Missouri courts because they were not incurred in securing a dissolution of the injunction, but also for defending the Equity suit in all its branches. These declarations of law cannot be said to have brought directly to the attention of the trial court any right or immunity under the Federal law, or the practice in the Federal Courts.

When the case was decided against defendant in the Circuit Court of Cooper county, the Railway company took an appeal to to the Kansas City Court of Appeals. No objection was made by the company to the jurisdiction of that court until after an adverse decision there. The Court of Appeals was then asked for the first time to transfer the case to the Supreme Court.

An application was subsequently made to the Supreme Court of Missouri for a writ of prohibition against the Kansas City Court of Appeals.

The Supreme Court of Missouri held that, while a Federal question might have been raised in the case the Railway company had not done so, and the record did not present any such question for decision. The Kansas City Court of Appeals had jurisdiction—not to decide a Federal question, but to decide the case, ignoring any Federal question that might have

raised but which was not so raised. No appellate been court in Missouri, upon the record in this case, had a right, under the decisions of the Supreme Court of that state, to pass upon or consider any Federal question, because such question does not appear from the record to have been passed upon by the trial court The Supreme Court, in denying the writ of prohibitino, said:

"That a Federal question could have been raised is not denied, but that such a question was not raised is most manifest."

It cannot, therefore, be said that there has been any decision by the highest court of the state against any title, right, privilege or immunity specially set up or claimed under the Constitution or laws of the United States. The Supreme Court of Missouri has simply said that there was no such question involved in this record, and therefore it could not be passed upon, and that the case was to be determined by the Court of Appeals as though no such question had been suggested.

Plaintiff in error contends that if the alleged Federal question was first raised when the case reached Kansas City Court of Appeals, it was in time, and the judgment of *that* court may be reviewed here; notwithstanding under the Missouri practice the record must show that such question was presented for decision to the trial court before it can be considered on appeal. This overlooks the fact that the Kansas City Court of Appeals has no jurisdiction to *hear or decide* a case involving a Federal question.

The rule established by the Supreme Court of Missouri is, that unless the record expressly shows that such question was presented to and passed upon by the court of original jurisdiction, it is not in the case, and must be ignored and the case disposed of without reference thereto.

There has been no final judgment in the highest court of the state of Missouri in which a decision in the suit could be had, denying plaintiff in error any right, privilege or immunity claimed under the Constitution or laws of the United States. The Supreme Court of the state, which is the only appellate court by which such a question can be decided, declined to take jurisdiction of the case on the sole ground that no such question was raised or presented by the record, and therefore, it could not be passed upon or decided upon appeal.

The case of plaintiff in error does not stand upon the proposition that there has been a final judgment by the highest court of the state, in which a decision of the case could be had, adverse to any right or immunity specially set up or claimed by the Railway company; but on the ground that the Supreme Court, which alone could pass upon such question upon appeal, declined to do so because it was not properly in the case and hence the judgment of the Court of Appeals must stand without reference to any such question. The case therefore does not come within section 709 of the Revised Statutes of the United States.

II.

The exemption claimed from liability for counsel fees, on the ground that the bond sued upon was given in an equity proceeding in the Federal Courts, and that in those courts such fees are not allowed as damages on injunction bonds, and therefore cannot be allowed in a suit upon the bond in any other court, is not available, even if well founded, unless "specially set up or claimed."

Columbia Water Power Co. vs. Columbia Electric Street Railway, Light and Power Co. 172 U. S., 475.

Eastern Building & Loan Association of Syracuse vs. Welling, 181 U. S. 49.

Sayward vs. Denny, 158 U. S. 180.

Oxley Stave Company vs. County of Butler, 166 U. S., 648.

The case cannot be reviewed here upon the ground that a Federal question was necessarily presented upon the face of the pleadings—For aught that appears the railway company may have deemed it unnecessary to rely upon any such matter. The Court of Appeals of New York, in Corcoran vs. Judson, 24 N. Y., 106, allowed attorney's fees as damages upon an injunction bond given in the Federal courts. The defendant in that case does not seem to have alleged any exemption or immunity under Federal laws or to have made any such claim. He was not bound to do so. It may well be that the railway company thought its other defenses were sufficiently strong, and that Elliott was not entitled to recover upon the bond at all, and, therefore, it was not necessary "to specially set up or claim" any such alleged immunity under Federal laws. It is not sufficient to say that the Federal question was necessarily involved in the suit. The statute requires it *to be specially set up or claimed*. This court, in Eastern Building & Loan Association v. Welling, 181 U. S., 47, says:

"The assertion that although no Federal question was raised below, and although the mind of the State Court was not directed to the fact that a right protected by the Constitution of the United States was relied upon, nevertheless that it is our duty to look into the record and determine whether the existence of such a claim was not necessarily involved—is demonstrated to be unsound by a conclusive line of authority."

Quite a number of authorities are then cited in support of this proposition. The court then adds:

"The error involved in the argument arises from failing to observe that the particular character of Federal right which is here asserted is embraced within those which the statute requires to 'be specially set up or claimed.' The confusion of thought involved in the proposition relied upon is very clearly pointed out in the authorities to which we have referred and especially in the latest case cited, to-wit: Columbia Water Power Co. vs. Columbia Electric Street & R. Light & Power Co."

III.

If, however, the question, was properly presented by this record, the judgment nevertheless was right. The State Court had jurisdiction of the suit upon the bond, notwithstanding the bond was given in a proceeding in a Federal Court. This is not an open question.

Meyers vs. Block, 120 U. S. 206.

The correct measure of damages was a matter of general law to be determined by the court where the case was tried. Reasonable attorneys' fees, necessarially incurred in the dissolution of the injunction are allowed under the rule in Missouri, and the trial court had the right to include same in the assessment of damages on the bond.

Meyers vs. Block, 120 U. S., 206.

1 Spelling on Extraordinary Legal Rem., 2nd Ed., Sec. 954.

Mitchell vs. Hawley, (Cal.) 21 Pac. Rep., 833.

Eastern Railway Co. vs. Brown, (Ky.) 36 S. W. Rep. 575.

Aiken vs. Leathers, (La.) 3 Southern Rep. 357.

Corcoran vs. Judson, 24 N. Y., 106.

Hannibal & St. Jo Railway Co. vs. Sheppard, 1 Mo. App., 254.

Walsh vs. Lackland, 8 Mo., App., 122.

Missouri, Kansas and Texas Railway Co. vs. Smith, 154 Mo., 300.

The Supreme Court of California, in discussing this question, used the following language:

"We cannot agree with counsel in the view that in an action brought in a court in this state, on an injunction bond given in a court of the United States, counsel fees can, in no instance, be recovered as damages, because such damages are not allowed by the Federal courts. Bondsmen, in such a case, cannot, be held to have contracted with the understanding that a suit would be brought upon the bond, if at all, in the Federal Court, and that their liabilities would be fixed according to the view which that court might be supposed to take of the law. If, for instance, the defendants here and the defendants in the injunction suit were all residents of California, which was probably the fact, an action on the bond could probably not be maintained in a Federal court at all."

The Court of Appeals of Kentucky, in Eastern Railway Co. vs. Brown, supra., said:

"This action is on an injunction bond and a demurrer sustained to the petition. The bond was executed in the United States Circuit Court for Kentucky, and by a mandatory injunction the appellant was compelled to deliver the appellee, Brown, an engine upon which it claimed a lien for repairs. It seems the state court had jurisdiction, although the bond was given in the Federal Court. Meyers vs Block, 120 U. S. 206, 7 Sup. Ct. 525. Under the rule in this court or in this state it is only where the enforcement of a judement has been enjoined that the court at the

time must ascertain the damages. Alexander v. Gish, 88 Ky. 13, 9 S. W. 801. The demurrer should have been overruled. Reversed and remanded, that this may be done."

The Supreme Court of Louisiana, in Aiken vs. Leathers, says that attorneys fees were allowed in the Block and Levi cases, which came to this court and were affirmed in Meyers vs. Block, 120 U. S. 206. The following quotation is taken from the opinion in Aiken vs. Leathers.

"As all the considerations which led that exalted tribunal to a denial of counsel fees, as an element of damages, refer to a demand assimilated to a claim for damages in an injunction suit proper, and to such a demand in chancery, we feel justified to conclude that the court did not intend to exclude such a demand in a suit at law, much less in an action filed in one of our state courts, in which there is no chancery, as distinguished from a jurisdiction at common law; or in a case in which a preliminary restraining order had been granted merely as ancillary to a principal demand for the cancellation of an important and valuable contract. These views are substantially confirmed by the reasoning used, and by the conclusions reached, by the Supreme Court in the cases of Meyers v. Block, and Meyers v. Levi, reported in 120 U. S. 206, 7 Sup. Ct. Rep. 525, which went up from this court on writs of error. In the decision of those cases the Supreme Court established a clear distinction between the issues involved therein and the question presented in the case of Bein v. Heath, 12 How. 168. In view of the great reliance placed by defendant's counsel herein on the latter decision, as sustaining the views alleged to have been announced in the case of Oelrichs v. Spain, we attach great importance to the decision in the Block case. In that case the obligors on the injunction bond, who were

therein sued on the bond, had made the point, which defendants substantially make here, that an action on a bond of injunction, given in equity, in and by order of a Federal Court, could not be entertained against the obligors on the bond in the courts, and subjected to the law and jurisprudence, of the State of Louisiana. And they had rested their argument on the authority of the case of Bein v. Heath, above referred to. After reviewing that case, and sustaining the various views therein announced, the court proceeded to demonstrate the difference between it and the Block case, saying; 'But according to our view, the bond sued on in the cases before us do not demand any such construction. It is plain that they could not be intended as security for any debt or *demand in litigation*, (italics are ours,) but as security only for the damages that might be sustained by the issuing of the injunctions. The condition is to pay 'all such damages as he (Isaacs in the one case, and Block in the other) may recover against us in case it should be decided that said writ of injunction was wrongfully issued.' Recover how? By the laws of Louisiana damages can be recovered for suing out an injunction without just cause, independently of a bond. Florance v. Nixon, 3 La. 291. But this cannot be done in the United States courts. Without a bond, no damages can be recovered at all. Without a bond, for the payment of damages, or other obligation of like effect, a party against whom an injunction wrongfully issued can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything. When, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them, it must mean that

they will pay such damages as he may recover by a suit on the bond itself. Otherwise it is senseless and vain. Construed in this way, it is in strict conformity with the order which required it. It is in this way that the bonds in question were finally construed by the Supreme Court of Louisiana, and we think that its construction was right.' 35 La. Ann. 220.

"The condition of the bond in suit in the instant case was that the obligors would "well and truly pay to Aken all such damages that he may recover against us in case it should be decided that the injunction or restraining order was wrongfully obtained," which is almost in terms precisely similar to the conditions in the bonds construed in the Block-Levi Cases by the Supreme court of the United States. Now, a reference to the record of those cases shows that counsel fees were an element of damages, in the demand as well as in the proof. Hence we feel authorized to conclude that the decisions which we have considered and consulted are not to be construed as excluding counsel fees as an element of damages in an action at law in a Federal Court, and a fortiori in a Louisiana court, for the recovery of damages on a bond of injunction given in and by the order of a Federal Court in an equity proceeding. Hence we hold that defendants' contention on that point is not supported by the authorities relied upon, and that it cannot be sanctioned in our jurisprudence."

The New York Court of Appeals allowed counsel fees in a suit upon an injunction bond given in the Federal Court, in Corcoran vs. Judson cited above.

The following is an extract from the opinion of the Supreme Court of the State of Missouri, in deny-

ing a writ of prohibition sought by the plaintiff in error in this case against the Kansas City Court of Appeals:

"It is thus to be seen that the main and principal question relied upon by defendant in that case in the trial court, as well as in the Kansas City Court of Appeals, was that the injunction in the United States Court, in the suit wherein the relator here was there complainant, and John S. Elliott was defendant, was only ancillary to the principal object of the action, and that the liability for counsel fees was incurred in defending the action generally, and that the dissolution of the injunction was only an incident to that result, and that counsel fees on the injunction bond are not properly recoverable for such services under such circumstances, but are so limited to such services only as are necessarily incurred in dissolving the injunction when that is the relief sought by the action. Upon that question, as thus raised and presented, the facts in the circuit court were found against the defendant (the relator herein) and as no Federal question was raised in its consideration or involved in its determination, and as the amount of the judgment rendered, on the determination of the question of facts, under the applicatory law was less than $2,500, the case on appeal was properly sent to the Kansas City Court of Appeals.

"But says the relator, conceding that the injunction bond given in the Federal Court was properly sued on in the Cooper county Circuit Court, and that the amount of judgment obtained thereon was such as to confer jurisdiction of the case on appeal in the Kansas City Court of Appeals, still the order of the Federal Court requires the bond in the first instance, the order filing it and making it a part of the record and proceedings of the Federal Court; the law of that court governing the liability under such

bonds, all became a part of the contract evidenced by the bond, and are involved in a suit upon that instrument, no matter in what court such suit may be instituted, and without regard to the fact whether the questions raised and considered were named or designated as federal questions or not; that authority exercised under the United States is necessarily involved and drawn in question by the suit on the injunction bond issued under the direction of the Federal Court, and that to ignore its mandates will not eradicate the question, or its existence.

"To us the contention of relator does not seem tenable. We fail to discover from the record anywhere, how "the validity of a treaty or statute of, or authority exercised under the United States is drawn in question," or that a Federal question may be said to have been involved in the case. In fact, both the petition and the answer in the case before the trial court, recognized the validity of the bond, and the action of the Federal Court in all its orders regarding or affecting the same. It is upon the bond as a valid instrument, issued by order of proper authority, that plaintiff's suit in the Circuit Court is predicted, and the relator's answer (as defendant) in that suit admits that it executed the bond under the facts as stated in the petition, and by way of defense thereto the relator simply answered that the injunction suit in which said bond was given, was a mere incident to a main suit then pending between the relator and said John S. Elliott, and that for dissolving the injunction under such circumstances attorney's fees are not allowable as an item of damages. That a Federal question could have been raised is not denied; but that such a question was not raised, is most manifest.

"If no challenge of authority exercised under the United States is in fact made by the record, the mere

assertion of its existence by counsel, coupled with the further fact that such a question might have been made under a proper answer, or by the development of a proper state of facts during the progress of the trial, will not suffice to deprive the Kansas City Court of Appeals of its jurisdiction to hear and determine upon the case as it reached that court, or to invest this court with jurisdiction thereof.

"Nor can we agree with counsel for relator in the proposition asserted, that the law or the rules of practice in the Federal Court, enter into and become a part of the contract evidenced by the bond taken therein, and to be treated and considered as if incorporated in it, and as forming a part of the contract, in a suit upon the bond in the State Court. The law of the land, the lex loci contractu, and not the rules of practice or the administration of the law in any given way in a particular jurisdiction when a bond is taken, must govern in suits upon such instruments. When the relator and his sureties signed the bond in the injunction proceedings in the United State Circuit Court at Jefferson City (instituted by itself as plaintiff against John S. Elliott as defendant) they contracted with the defendant therein to become liable for and to pay all sums of money, damages and costs, that shall be adjudged against the plaintiff, in those proceedings if the injunction should be dissolved—not merely such damages as under the rules and practice of that court are allowable therein, but all damages allowable by the law of the place where said bond is made and executed, as the same is administered in the courts of the situs of the bond.

A bond of this character, sued on in a state court, is to be interpreted by the rules that govern the consideration of a like instrument executed in the state courts, and while the obligors in this bond may be said to have known when they executed it, that in

the United States Court they would not be held liable to pay attorneys' fees, they must have also known, and did in contemplation of law know, that in a proceeding in our State Court upon like instruments, attorney's fees are allowable as one of the items of damages recoverable, when the injunction shall be dissolved by the labor and efforts of attorneys employed for that purpose, and that if the suit on the bond to be signed was begun, as in this case, in a state court, the rules of interpretation governing such obligations there would apply to this bond.

Neither the rules, the practice or procedure, nor the mode and manner of administering the law in the United States Court, applicable to the liability of bondsmen on an injunction bond given in that court, can in anywise be drawn in question, so as to present a federal question in a suit in a state court on the bond, when its validity, as in the case of Elliott against the relator railway company, begun in the Cooper County Circuit Court and now pending on appeal in the Kansas City Court of Appeals, is admitted and where no question as to the court's authority to order the bond as given is or was made by the relator.

As said, the relator, as defendant in the suit now pending in the Kansas City Court of Appeals on appeal, contested the issue by an answer that in no way drew in question authority exercised under the United States, nor did it set up any claim or right by authority exercised under the United States, as abridged or taken away, nor did it deny that the state court, wherein the suit was instituted, had authoriy to hear and determine the case. The authority of the Cooper county Circuit Court to hear and determine the case in the first instance is conceded by counsel.

While there is no doubt upon the question as to the power of the Federal Court of equity to have imposed such terms as it chose as a condition to grant-

ing the injunction, it is equally true that when it had imposed conditions such as those stipulated in the bond in the suit (in the case of Elliott v. Railway Co., now in the Kansas City Court of Appeals, on appeal) that court had no authority under its rules of practice and procedure, to render a judgment for the damages occasioned by the conditions broken, on the dissolution of the injunction, but it must, as it did, leave the obligee then to proceed in a court of law for such damages as were occasioned to the defendant in that suit. As the obligee is driven of necessity to a court of law, to recover his damages on the dissolution of the injunction in the Federal Court of equity, the condition of the bond would be meaningless in many instances if only a Federal Court could hear and determine the issue involved. If in a Federal Court alone, such bonds could be sued on, when the obligor and obligee therein were citizens of the same state, the bond would become a meaningless nothing, as no right thereunder could be enforced in a Federal Court, on account of common citizenship.

The validity of no statute, treaty or authority exercised under the United States being drawn in question by the relator's answer in the suit on the bond in the Cooper County Circuit Court that would operate, under article 6, section 12 of the constitution of this state, to divest the Kansas City Court of Appeals of jurisdiction thereof, hence, no authority in this court by a writ of prohibition to order that court to stay proceedings therein or to transfer the case here for final disposition on that account, as asked by relator."

WILLIAM M. WILLIAMS.
Attorney for Defendant in Error.